

MELINDA HAAG
United States Attorney
THOMAS NEWMAN
Assistant United States Attorney

HENRY C. DARMSTADTER
JAMES E. WEAVER
ADAM D. STRAIT
Trial Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 683, Ben Franklin Station
Washington, D.C. 20044-0683
Telephone: (202) 307-6481
Facsimile: (202) 307-0054
henry.c.darmstadter@usdoj.gov
james.e.weaver@usdoj.gov
adam.d.strait@usdoj.gov
Western.Taxcivil@usdoj.gov

Attorneys for the United States of America

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

SANTA CLARA VALLEY HOUSING)	Case No. 5:08-cv-05097-LHK-HRL
GROUP, INC. and KRISTEN M. BOWES,)	
Plaintiffs,)	UNITED STATES' REPLY TO
)	OPPOSITION TO MOTION TO
)	COMPEL TESTIMONY OF DOUGLAS
)	DUNCAN
v.)	
)	Date: December 7, 2010
)	Time: 10:00 a.m.
)	Courtroom 2
UNITED STATES OF AMERICA,)	
)	
Defendant.)	

The United States hereby files this reply to Douglas Duncan's Opposition to Motion to Compel Testimony in order to clarify the record and to apprise the Court of communication between counsel for third-party witness Dale Affonso and the United States Attorney's Office for the Southern District of New York.

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1 In the United States' Non-Opposition and Response to Motion to Compel Testimony of
2 Douglas Duncan ("Duncan"), filed on November 12, 2010, the United States indicated that based
3 upon concerns expressed by counsel regarding Duncan's potential criminal exposure, the Tax
4 Division civil attorneys handling the instant matter referred him to the United States Attorney for
5 the Southern District of New York ("SDNY"). The SDNY had prosecuted the criminal charges
6 against the former KPMG partners (*United States v. Stein*, 541 F.3d 130 (2d Cir. 2008)) and had
7 handled the KPMG Deferred Prosecution Agreement. *Id.* at 139. When a deponent/witness in a
8 civil matter inquiries as to whether he or she is under criminal investigation, Tax Division civil
9 attorneys are advised not to comment on the matter but to refer the deponent/witness to the
10 appropriate prosecutor's office. Based upon similar concerns expressed by counsel for other
11 former KPMG employees (Larry Manth, Andrew Atkin and Douglas Duncan), the civil attorneys
12 also referred them to the SDNY.

13 Accordingly, Duncan is not entirely accurate in his Opposition where he represents that
14 government counsel refused to provide him with assurances that he was not under criminal
15 investigation. In point of fact, government counsel advised him that any such inquiries regarding
16 a criminal investigation pertaining to him or the SC2 strategy should properly be directed not to
17 the civil attorneys but to the SDNY. The United States maintains that it is not overly
18 burdensome but more efficient for any witness concerned about the criminal implications of his
19 or her testimony to communicate directly with the prosecutors involved in the matter rather than
20 through the civil attorneys acting as intermediaries

21 Following the filing of the United States' Non-Opposition, on November 16, 2010, the
22 Tax Division civil attorneys were advised by Assistant United States Attorney Shirah Neiman,
23 who supervised the KPMG investigation and prosecution, that she had been telephonically
24 contacted by Jessica Tulk, one of the attorneys representing Dale Affonso, to inquire as to
25 whether any investigation was ongoing with respect to the SC2 strategy. Neiman advised Ms.
26 Tulk that SDNY did not have an ongoing or active investigation of SC2, and never had such an
27 investigation in the past. Ms. Neiman also advised Ms. Tulk that the SDNY did not have an
28 active or ongoing investigation of Dale Affonso. Obviously, the lack of an ongoing investigation

1 would not foreclose an investigation in the future should circumstances warrant and the statute of
2 limitations remain open. As of the time of the filing of this reply, the government is unaware of
3 any other efforts to contact the SDNY by any other attorneys for any of the other former KPMG
4 employees, including Duncan.

5 Dated this 30th day of November, 2010.

6 MELINDA HAAG
7 United States Attorney
8 THOMAS NEWMAN
9 Assistant United States Attorney

10 /s/ Henry C. Darmstadter
11 HENRY C. DARMSTADTER
12 JAMES E. WEAVER
13 ADAM D. STRAIT
14 Trial Attorneys, Tax Division
15 U.S. Department of Justice
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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing **UNITED STATES' REPLY TO OPPOSITION TO MOTION TO COMPEL TESTIMONY OF DOUGLAS DUNCAN** has been made this 30th day of November, 2010, by attaching the same .pdf files as filed with the Court to emails to Stan Roman, counsel for Douglas Duncan, at sroman@kksrr.com; to Brady Toensing, counsel for Larry Manth, at Brady@diGToe.com; to Mike Young, counsel for Andrew Atkin, at michael.young@alston.com; and Robert Corbin, counsel for Dale Affonso, at rlcorb@corbfitzlaw.com. I further certify that service was also made by depositing a copy of each of the documents listed above thereof in the United States Mail in postage prepaid envelopes addressed to:

Charles P. Rettig
Avram Salkin
Steven Toscher
Edward M. Robbins
Sharyn M. Fisk
Hochman Salkin Rettig Toscher & Perez, P.C.
9150 Wilshire Boulevard, Suite 300
Beverly Hills, California 90212

Stan G. Roman
Krieg Keller Sloan Reilly & Roman, LLP
555 Montgomery St., 17th Floor
San Francisco, CA 94111

Brady Toensing
DiGenova & Toensing, LLP
1776 K St. NW, Suite 737
Washington, D.C. 20006

Robert L. Corbin
Law Offices of Corbin, Fitzgerald, & Athey LLP
601 W. 5th Street, Suite 1150
Los Angeles, CA 90071-2024

Michael D. Young
Alston & Bird, LLP
333 S. Hope St., 16th Floor
Los Angeles, CA 90071

/s/ Henry C. Darmstadter
Henry C. Darmstadter
Trial Attorney, Tax Division
U.S. Department of Justice